Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CG Docket No. 02-278
Petition for Waiver of	)	
Papa Murphy's Holdings, Inc. and	)	
Papa Murphy's International LLC	)	
	)	

RESPONSE TO PETITION FOR RECONSIDERATION OF RETROACTIVE WAIVER TO PAPA MURPHY'S HOLDINGS, INC. AND PAPA MURPHY'S INTERNATIONAL L.L.C.

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I. INTRODUCTION

Papa Murphy's Holdings, Inc. and Papa Murphy's International LLC (collectively, "Papa Murphy's"), through their undersigned counsel, respectfully submit their response to John Lennartson and Susan Shay Nohr's (collectively, "Petitioners") Petition for Reconsideration of Retroactive Waiver to Papa Murphy's Holdings, Inc. and Papa Murphy's International L.L.C. Petitioners' brief is little more than a recitation of arguments that the Commission has already considered and soundly rejected. The Petition thus falls within the category of reconsideration petitions the Commission's own rules state should be summarily dismissed.[1]

Petitioners' first argument—that there was not good cause to grant a waiver in this instance—is largely a recitation of the opposition Mr. Lennartson filed in response to Papa Murphy's original petition. As before, Petitioners claim special circumstances warranting a waiver do not exist because the Commission did not make a detailed factual finding regarding Papa Murphy's confusion over the prior order. Petitioners ignore, or fail to realize, that the special circumstance was the existence of a prior order regarding the written consent standard that was confusing on its face. Petitioners also repeat Mr. Lennartson's opposition arguments that a waiver is not in the public interest 1) because hardship to Papa Murphy's is an insufficient reason to grant a waiver, and 2) because a waiver would supposedly have a negative effect on privacy interests. The Commission previously rejected both arguments for good reason. Petitioners misrepresent the Commission's prior order in making their first argument and ignore that Papa Murphy's only sent text messages to those who provided written consent and always informed individuals how to opt out of receiving text messages—hindering any claim that privacy is a genuine issue.

[1] 47 C.F.R. § 1.106(p) ("Petitions for reconsideration of a Commission action that plainly do not warrant consideration by the Commission may be dismissed or denied by the relevant bureau(s) or office(s). Examples include, but are not limited to, petitions that: … Rely on arguments that have been fully considered and rejected by the Commission within the same proceeding").

Petitioners second principal argument—that the Commission is not permitted to grant retroactive waivers in the context of federal court litigation—fairs no better. Petitioners' claims on this point have been repeatedly rejected by the Commission, as well as federal courts.

The Commission should accordingly decline to accept Petitioners' arguments, as it has done before, and affirm its order properly granting limited waivers of the Commission's rules regarding express written consent.

II. Background

A. The Commission's prior orders created confusion about the express written consent standard.

The TCPA prohibits making a call "using any automatic telephone dialing system" ("ATDS") to "any telephone number assigned to a . . . cellular telephone service" unless the caller has the "the prior express consent of the called party."[2] Until October 16, 2013, the applicable consent standard was simply that the caller needed "prior express consent" to send text messages using an ATDS to a wireless phone number.[3] That consent could be oral or written, and was given when a person "knowingly release[ed] [his] phone number" to a business.[4]

The Commission later amended its rules to prohibit calls made with an ATDS that "introduce[] … advertisement[s] or constitute[] telemarketing," unless the caller has obtained the "prior express written consent" of the person being called.[5] This new rule contains various requirements for what qualifies as "prior express written consent."[6] When announcing this rule change, the Commission made the ambiguous statement that "once our written consent rules become effective . . . an entity will no longer be able to rely on non-written forms of express consent to make autodialed . . . telemarketing calls, and thus could be liable for making such

[2] 47 U.S.C. § 227(b)(1)(A)(iii).
[3] 47 C.F.R. § 64.1200(a)(1) (2013).
[4] *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8769 (1992).
[5] 47 C.F.R. § 64.1200(a)(2).
[6] 47 C.F.R. § 64.1200(f)(8).

calls absent prior written consent."[7] In its July 2015 Order, the Commission acknowledged that this language "could have reasonably been interpreted to mean that written consent obtained prior to the consent rule's effective date would remain valid even if it does not satisfy the current rule" and granted a retroactive waiver of the rule's application as to calls made and texts sent to individuals that consented in writing before October 16, 2013.[8] The Commission further granted a prospective waiver to the petitioners so that they would have 89 days from the order to obtain new consents.[9]

Based on the Commission's July 2015 Order, Papa Murphy's filed its own petition seeking a waiver for text messages sent to individuals who had provided their prior written consent prior to October 16, 2013.[10] It its petition, Papa Murphy's asserted it was similarly situated to the petitioners in the July 2015 Order because "[l]ike the petitioners that received the relief in the 2015 Order, Papa Murphy's only transmitted text messages to persons who had affirmatively requested the receipt of such messages through their express **written** consent. However, believing this written consent remained valid, Papa Murphy's did not re-opt in customers who signed up for its texting program prior to October 16, 2013."[11]

On October 14, 2016, the Commission[12] granted Papa Murphy's petition, along with those of six other similarly situated petitioners. The Commission's order held that good cause existed to grant the requested waivers because there were special circumstances and the waivers

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[7] *In re Rules & Reg's Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830, 1857 (2012).
[8] *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 8014 (2015).
[9] *Id.* at 8015.
[10] Petition for Reconsideration of Retroactive Waiver to Papa Murphy's Holdings, Inc. and Papa Murphy's International L.L.C. ("Petition"), Ex. 5.
[11] Petition, Ex. 5 at 2.
[12] The October 14, 2016 order was issued by Consumer and Governmental Affairs Bureau pursuant to its delegated authority. Papa Murphy's refers to the Bureau and the Commission collectively as the "Commission" in this response.

were in the public interest.[13] Specifically, the Commission affirmed its July 2015 Order, holding that the language in the prior orders, which "could reasonably have been interpreted by the petitioners to mean that written consent obtained prior to the current rule's effective date would remain valid even if it does not satisfy the current rule," constituted a special circumstance warranting a waiver.[14]

The Commission also expressly rejected Mr. Lennartson's argument, repeated throughout Petitioners' brief, that a waiver was not justified because there was no detailed factual finding of confusion. Because the Commission did not make a detailed factual finding of confusion in its July 2015 Order, which granted similar waivers, the Commission found that such an inquiry was not required in this instance.[15]

The Commission therefore properly granted the requested waivers by identifying the special circumstance that existed, and considering, and rejecting, the principal argument Petitioners raise in their reconsideration petition.

B. Papa Murphy's has only sent text messages to individuals who provided their written consent.

Prior to June 17, 2015, Papa Murphy's offered individuals the option of receiving coupons and other promotions via text message.[16,17] At all times, customers who wished to

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[13] Declaration of Anthony Todaro in Support of Response to Petition for Reconsideration of Retroactive Wavier to Papa Murphy's Holdings, Inc. and Papa Murphy's International L.L.C. ("Todaro Decl."), Ex. A at ¶¶ 11–12.

[14] *Id.* at ¶ 12.

[15] *Id.* at ¶ 16 ("We also reject arguments that the Commission made proof of confusion a requirement to obtain a waiver. In addressing that argument, Papa Murphy's asserts that it would not be equitable to require a detailed factual finding that it was in fact 'confused' and that such a requirement would run counter to the logic of the Commission's 2015 order. In the 2015 Declaratory Ruling, the Commission did not require petitioners to plead specific, detailed grounds for individual confusion, and we do not believe there is any basis for imposing that requirement on these parties who assert that they were similarly situated.") (internal footnotes omitted).

[16] Petition, Ex. 5, Declaration of Andrew Brawley in Support of Petition for Waiver ("Brawley Decl.") ¶ 2.

[17] Papa Murphy's completely halted its text messaging program on June 17, 2015. After completing a comprehensive review of its text messaging program, Papa Murphy's renewed its

receive such promotions affirmatively provided their written consent to take part in the program through one of the following ways: (1) an interested customer would text a message to a specified short code; or (2) an interested customer would fill out an online sign-up form.[18] Papa Murphy's only sent text messages to persons who affirmatively opted in to the receipt of such messages.[19] Papa Murphy's did not condition receipt of promotions on consent to receive text messages.[20,21] Further, every text message Papa Murphy's sent informed customers they could stop receiving text messages by replying "stop."[22]

In response to the Commission's 2012 order, which altered the written consent requirements, Papa Murphy's updated the disclosures on its website on or about October 16, 2013 to include additional disclosures, including the disclosure that consent to receive text messages was not required to receive Papa Murphy's advertised offers.[23]

C. Mr. Lennartson filed a putative class action, which Papa Murphy's has moved to dismiss.

Despite this entirely voluntary enrollment process, which required written consent, Mr. Lennartson sued Papa Murphy's in a putative class action alleging violations of the TCPA, on the grounds that the consent Papa Murphy's obtained was not sufficient.[24] Mr. Lennartson is not contesting that he requested to receive text messages. Rather, Mr. Lennartson, who signed up to receive text messages through Papa Murphy's website in 2012 and never attempted to cease

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text message program in July 2015, but elected to send text messages to only those people who signed up for the program after the July 2015 program relaunch. Brawley Decl. ¶ 4.

[18] Petition, Ex. 5, Brawley Decl. ¶ 2.

[19] *Id.* ¶ 3.

[20] *Id.*

[21] Petitioners' claim that this statement is false is misguided. *See* Petition at 9 n.6. Customers were able to get the deals advertised through text messages through other means, including by email. *See* Declaration of Cynthia Hofmann in Support of Response to Petition for Reconsideration of Retroactive Waiver to Papa Murphy's Holdings, Inc. and Papa Murphy's International L.L.C. ("Hofmann Decl.") ¶ 3.

[22] Petition, Ex. 5, Brawley Decl. ¶ 3.

[23] *See* Hofmann Decl. ¶ 2.

[24] The case is captioned *Lennartson v. Papa Murphy's Holdings, Inc. et al.*, No. 3:15-cv-05307-RBL (W.D. Wa.).

receiving the text messages, claims Papa Murphy's violated the TCPA by sending him text messages without his technically proper written consent. Specifically, Mr. Lennartson argues that his 2012 written consent did not meet the precise contours of the new "prior express written consent" standard of Section 64.1200(a)(2), (f)(8), and thus was not effective after October 16, 2013.[25] Mr. Lennartson does not contend that text messages Papa Murphy's sent prior to the October 2013 rule change were violative of the TCPA; instead, he argues only that his consent was no longer valid after the rule change.[26]

In response to Mr. Lennartson's complaint, Papa Murphy's filed a motion for summary judgment, or in the alternative, for a stay pending the U.S. Supreme Court's ruling in *Spokeo v. Robins*.[27] In its motion, Papa Murphy's argued that the Commission's July 2015 Order constituted a new adjudicatory rule that should not be applied retroactively, rendering plaintiff's claim regarding the lack of consent disclosures obsolete.[28] The court ruled against Papa Murphy's, but found that a stay was warranted until *Spokeo* was decided.[29] Since the U.S. Supreme Court issued its *Spokeo* decision in May 2016, the case has progressed, but remains an individual action in which no class certification motion has been filed.

Shortly after the Commission's October 14, 2016 order, Papa Murphy's moved to dismiss Mr. Lennartson's lawsuit on that grounds that he no longer had a valid lawsuit given that his claim fits squarely within the Commission's waiver.[30] In response, Mr. Lennartson filed a motion to continue his response brief until he could file present petition for reconsideration, take additional discovery, and file a motion to amend his complaint to add additional parties. Mr. Lennartson has also now filed his motion to amend the complaint to add additional state law

[25] Papa Murphy's does not concede that its consent process did not meet Section 64.1200's current standard.
[26] The issue of whether Papa Murphy's, or any other third party that sent text messages, used an "automatic telephone dialing system" has not been formally addressed in the litigation and Papa Murphy's does not concede that such a device was used.
[27] Petition, Ex. 2.
[28] *Id.* at 10:10–14:17.
[29] Petition, Ex. 4.
[30] Todaro Decl., Ex. B.

claims and three new named plaintiffs. Papa Murphy's opposes both motions. Specifically, Papa Murphy's intends to argue that any amendment to Mr. Lennartson's complaint will be futile because his additional state law claims are not legally cognizable (given each of the potential plaintiffs' written consent) and because there was no TCPA violation (given the Commission's order and Papa Murphy's post-October 16, 2013 consent disclosures).

III. The Commission properly granted the at-issue waiver under its good cause standard.

A. The Commission properly articulated the relevant waiver standard.

The Commission articulated the proper good cause standard for granting a waiver—*i.e.*, that special circumstances exist and that a waiver is in the public interest—and Petitioners' arguments to the contrary lack merit. In its order, the Commission stated that "[a] waiver may be granted if: (1) the waiver would better serve the public interest than would application of the rule; and (2) special circumstances warrant a deviation from the general rule."[31] Notwithstanding the foregoing, Petitioners claim that the Commission erred because "[i]n assessing each of those prongs, the Bureau must articulate a 'relevant standard' to ensure that the decision to grant a waiver is not an act of 'unbridled discretion or whim.'"[32] Petitioners misread the relevant case law and are mistaken. *WAIT Radio* did not hold that the Commission must articulate a relevant standard *for assessing the duel prongs of special circumstances and public interest.* Rather, *WAIT Radio* held only that waivers must be based on an "appropriate general standard."[33] Relying on *WAIT Radio's* holding, the D.C. Circuit held in *Northeast Cellular* that a waiver should be granted when "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."[34] *WAIT Radio's* call for a "relevant standard" is thus the dual prong analysis the D.C. Circuit articulated in *Northeast Cellular*, and which the Commission properly stated in its order. Accordingly, Petitioner's contention that a

[31] Todaro Decl., Ex. A at ¶¶ 11–12 (citing *Ne. Cellular Tel. Co., L.P. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).
[32] Petition at 12 (quoting *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).
[33] *WAIT Radio*, 418 F.2d at 1159.
[34] *Ne. Cellular*, 897 F.2d at 1166.

standard was not properly articulated is based on a contortion of the case law to create a standard that simply does not exist.

B. The Commission appropriately found that its prior orders could have reasonably caused confusion.

Petitioners repeat the same argument Mr. Lennartson raised in his opposition that a waiver should not have been granted because "the Bureau rejected the need for any evidence that Papa Murphy's was confused by the 2012 Order."[35] The Commission previously declined to accept this argument and it should do so again here.[36] In its order, the Commission acknowledged its finding from the July 2015 Order that "language in the 2012 order could reasonably have been interpreted by the petitioners to mean that written consent obtained prior to the current rule's effective date would remain valid even if it does not satisfy the current rule" and the waiver it granted to the prior petitioners based on this confusion.[37] The Commission then stated that the instant petitioners, including Papa Murphy's, should receive the same waivers because they "adequately demonstrated that they are similarly situated to the initial waiver recipients."[38]

Petitioners claim Papa Murphy's is not similarly situated to the prior petitioners because "[w]hile the FCC 'acknowledge[d] evidence of confusion' on the part of the Coalition and DMA as to the effect of the 2012 Order on previously-obtained [sic] consents (2015 Declaratory Ruling ¶ 101), Papa Murphy's failed to even allege confusion, much less offer any evidence of it."[39] This is the same argument that Mr. Lennartson made in his opposition brief, which the Commission rightly rejected. Mr. Lennartson again misreads the July 2015 Order. In that order, the Commission stated: "We nevertheless acknowledge evidence of confusion on the part of Petitioners, and believe it is reasonable to recognize a limited period within which they could be expected to obtain the prior express written consent required by our recently effective rule.

[35] Petition at 12.
[36] *See* 47 C.F.R. § 1.106(p).
[37] Todaro Decl., Ex. A ¶ 12.
[38] *Id.*
[39] Petition at 13.

Specifically, the Commission stated in the 2012 TCPA Order that '[o]nce our written consent rules become effective ... an entity will no longer be able to rely on non-written forms of express consent to make autodialed or prerecorded voice telemarketing calls, and thus could be liable for making such calls absent prior written consent.'"[40] Based on the plain language of the order, the "evidence of confusion" to which the Commission was referring was the language in the 2012 Order, not a detailed factual finding that the petitioners were "confused." Accordingly, no detailed factual finding regarding confusion is required for the Commission to find that Papa Murphy's is similarly situated.[41] Indeed, if the Commission were inclined to require a factual finding here, it would necessarily call into question the July 2015 Order, which did not require such a finding. No such sea change is necessary. Nothing in the Commission's rules require that waiver applicants submit detailed factual findings regarding their requested relief.[42] It was therefore reasonable for the Commission to find that the 2012 order was confusing on its face, thereby establishing a presumption of good cause for waivers.

Finally, contrary to Petitioners' arguments'—the same arguments Mr. Lennartson raised in his original opposition—the "facts" plaintiff presents, now for the second time, do not rebut this presumption.[43] Petitioners submit two screenshots taken from an internet archiving website,

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[40] *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 8014 (2015).

[41] Moreover, the Commission rejected this exact argument—*i.e.*, that petitioning entities must show actual confusion—when it granted waivers of the TCPA's fax provisions to entities that were similarly situated to those entities that had previously received a waiver of the same provisions due to ambiguous guidance from the Commission. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 8598, 8611 (2015) ("we reject arguments that the Commission made actual, specific claims of confusion a requirement to obtain the waiver.).

[42] As outlined above, Petitioners' reliance on *WAIT Radio* for the proposition that a detailed factual finding is required is misplaced. *See supra* Section III.A. *WAIT Radio* held only that waivers must be based on an "appropriate general standard"—*i.e.* a good cause standard where special circumstances exist and a waiver is in the public interest. *Id.*

[43] Although Petitioners contend that "Papa Murphy's … did not even allege that it had been confused by any language in the 2012 Order" (Petition at 11), they appear to acknowledge otherwise by quoting Papa Murphy's petition, which stated "Like the petitioners that received relief in the 2015 Order, Papa Murphy's only transmitted text messages to persons who had affirmatively requested the receipt of such messages through their express **written** consent.

which they claim show a failure to acknowledge the Commission's 2012 order after the October 16, 2013 effective date.[44] Petitioners evidence is flawed. Petitioners fail to acknowledge that the internet archiving site on which they relied does not archive all text on the webpage, and that there are significant blank spaces on the pages they reference.[45] In reality, Papa Murphy's did make changes to the disclosures on its website on or about October 16, 2013, including adding the disclosures that consent to receiving text messages was not required to obtain the advertised offers.[46] There is thus no question that Papa Murphy's acknowledged and work to comply with the new written consent standard.

Petitioners' argument that granting a waiver was in error because the Commission did not make a detailed factual finding of confusion is thus legally and factually flawed. The Commission properly found good cause existed based on the confusion caused by the plain language of its prior orders.

C. A waiver is in the public interest.

Petitioners provide two principal reasons why a waiver is supposedly not in the public interest: 1) that the risk of substantial liability does not support a waiver, and 2) that a waiver negatively effects Petitioners' privacy interests. Neither argument is persuasive.

Petitioners' first argument is nothing more than a recitation of the argument Mr. Lennartson made in his original opposition, and again misconstrues the Commission's prior order. Citing the Commission's October 30, 2014 Order, which itself granted limited waivers under the TCPA, Petitioners state: "As the FCC has recognized, 'the risk of substantial liability in private rights of action, is by itself, [not] an inherently adequate ground for waiver.'"[47]

However, believing that this written consent remained valid, Papa Murphy's did not re-opt in customers who signed up for its texting program prior to October 16, 2013." Petition, Ex. 5 at 2 (emphasis in original).

[44] *See* Petition at 14.

[45] Papa Murphy's informed Mr. Lennartson of these deficiencies when he submitted these screen shots in the federal district court litigation.

[46] *See* Hofmann Decl. ¶ 2.

[47] Petition at 16 (quoting *Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 F.C.C. Rcd. 13998, 14011 (2014).

Petitioners take the quotation out of context. The quotation in full reads: "Confusion or misplaced confidence about the rule, however, warrants some relief from its potentially substantial consequences. Thus, to be clear, our finding is not that the risk of substantial liability in private rights of action is, by itself, an inherently adequate ground for waiver, as some commenters note. But we disagree that it cannot be a factor for our consideration, in conjunction with other considerations, like the potential for Commission enforcement, as well."[48]

Beyond mangling the Commission's order, Petitioners give no weight to the substantial costs that Papa Murphy's has incurred, in terms of both financial and personnel resources, and likely will continue to incur to defend itself in the litigation. In the putative class action, substantial briefing has already occurred and Mr. Lennartson has propounded extensive discovery, not only on Papa Murphy's, but also on third parties with which Papa Murphy's does business. Papa Murphy's has had to expend considerable resources, simply because it did not seek additional consents in 2013 from people who 1) had already provided their written consent to receive text messages, and 2) could have opted out of receiving messages at any time (and were provided with information on how to do so). These resources have been taken away from Papa Murphy's day-to-day operations. The net effect of substantial financial punishment for businesses that reasonably interpret the Commission's rules and cause no injury to any customer of that business is to chill businesses from engaging in any form of promotion that "might conceivably" be one day regarded as a violation of the rules.[49] That is harmful to businesses,

[48] *Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 F.C.C. Rcd. 13998, 14011 (2014) (internal footnote omitted).

[49] Petitioners also make the bizarre claim that "[i]f the Bureau were to consider the costs of litigation, it must necessarily also consider the substantial costs that Petitioner Lennartson has incurred to prosecute his case, which were expended only because he relied on the protections of the 2012 Order." Petition at 16. Petitioners apparently fail to realize that Mr. Lennartson was the party who *chose to file the lawsuit* and thus took on the risk of litigating the case. Assuming Mr. Lennartson carefully considered the 2012 order before filing his lawsuit, he would have noted the ambiguity in the 2012 order, and, acknowledging his own written consent, would have been able to fairly assess the likelihood of success of his lawsuit. Moreover, a lawsuit was not required to halt the activity about which Mr. Lennartson complains—*i.e.*, receiving text

their customers, the people they would employ, the goods and services they would purchase and, as a result, to the public at large.

Petitioners' second argument—that a waiver hinders privacy interests—fairs no better. Petitioners argue that "Papa Murphy's interest in escaping liability in a civil action and avoiding the expense of defending a meritorious lawsuit is heavily outweighed by Petitioners Lennartson and Nohr's consumer privacy rights, which the TCPA expressly protects."[50] Privacy is important, but a waiver in this instance does nothing to undermine the policy objectives of the TCPA. As stated, Papa Murphy's only sent text messages to people who sought to receive them and provided their written consent. Papa Murphy's thus satisfied the rule's objective of ensuring individuals' privacy was protected by not receiving unsolicited text messages. Neither of the petitioners have, or do, claim that they would *not* have requested to receive text messages if they had received the disclosures on which they rest their claim. Finally, following the FCC's July 2015 Order, Papa Murphy's suspended its text program and began the opt-in process anew in strict conformity with the new rules regarding express written consent. Accordingly, a waiver in this instance has nothing to do with the Petitioners' privacy—they both stopped receiving text messages over a year ago—and is only about allowing Petitioners to collect money at Papa Murphy's expense.[51]

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messages he signed up for. Rather, Mr. Lennartson could have replied "STOP" to any of the text messages—as every text he received informed him he could do.

[50] Petition at 17.

[51] Petitioners' claim that "if the Waiver Order retroactively extinguishes Petitioners Lennartson and Nohr's private right of action under the TCPA, the Bureau would undermine the public interest of encouraging private litigation under 47 U.S.C. § 227(b)(3)" is misguided. *See* Petition at 17. Under this logic, *any* waiver would automatically be against the public interest because it did not allow plaintiff's to recover statutory damages. In reality, the TCPA provides significant financial incentives for potential plaintiffs and granting a well-founded waiver will not alter those incentives. *See* 47 U.S.C. § 227(b)(3).

IV. The Commission's order should not be modified given the Commission's established authority to retroactively waive its own rules.

A. The Commission can retroactively waive causes of action.

The Commission has repeatedly rejected Petitioners' arguments on this point. Petitioners assert that "[t]he TCPA does not provide the Bureau with authority to waive or otherwise impair a private cause of action that arises under the statute, and this absence underscores that the Bureau lacks such authority."[52] Not so. In its 2014 order, granting waivers of its rules, the Commission stated "By addressing requests for declaratory ruling and/or waiver, the Commission is interpreting a statute, the TCPA, over which Congress provided us authority as the expert agency. Likewise, the mere fact that the TCPA allows for private rights of action based on violations of our rules implementing that statute in certain circumstances does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply."[53] The Commission affirmed this position in a 2015 order, which also granted waivers of its rules in the context of pending federal court TCPA litigation: "As the Commission has previously noted, by addressing requests for declaratory ruling and/or waiver, we are interpreting a statute, the TCPA, over which Congress provided the Commission authority as the expert agency. Likewise, the mere fact that the TCPA allows for private rights of action to enforce rule violations does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply."[54] Petitioners arguments on this point, like many of the arguments discussed above, have been considered by the Commission and rejected.[55]

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[52] Petition at 19.

[53] *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 F.C.C. Rcd. 13998, 14008 (2014) (internal footnotes omitted).

[54] *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 8598 (2015) (internal footnotes omitted).

[55] Additionally, the two cases on which Petitioners principally rely, *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990) and *Natural Resource Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014), are inapposite. Unlike the agency in *Adams Fruit*, which purported to prevent plaintiffs from filing suit, the Commission's waiver does not seek to "regulate the scope of the judicial power vested by the statute." *Adams Fruit*, 494 U.S. at 650. On the contrary, the Commission's action is fully consonant with Congress' decision to vest private parties with a right to file suit based on a violation of Commission rules. The Commission's order simply makes clear that the

B. Granting a retroactive waiver does not violate the doctrine of separation of powers.

The Commission has similarly rejected arguments that granting waivers of its rules in the context of pending federal court litigation violates the doctrine of separation of powers. In its 2014 order granting waivers of its rules regarding the sending of faxes, the Commission dismissed the same separation of powers argument, stating "we reject any implication that by addressing the petitions filed in this matter while related litigation is pending, we have violate[d] the separation of powers vis-à-vis the judiciary."[56]

Petitioner's reliance on *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 498 (W.D. Mich. 2014), does not alter the analysis. First, *Stryker's* conclusory claim that "It would be a fundamental violation of the separation of powers for the administrative agency to 'waive' retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court," was totally unsupported by legal authority. Second, it appears that the *Stryker* court was conflating statutes with regulations. The Commission's order at issue in *Stryker* dealt with regulations requiring opt-out notices on solicited fax advertisements—not on the statutory terms of the TCPA, which only requires opt-out notices on unsolicited advertisements.[57] Accordingly, the *Stryker* court's statement that "the

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rule on which the suit would otherwise be based is not enforceable because there is no enforceable violation regarding express written consent requirements for those individuals who provided written consent prior to October 16, 2013. This case is also unlike *NRDC*, in which the court invalidated an "affirmative defense" that the Environmental Protection Agency had purported to establish by regulation for citizen suits under the Clean Air Act. The *NRDC* court held that Congress, by explicitly tasking the district court with imposing "appropriate" penalties, had signaled an intent to withdraw any similar role from the agency. *NRDC*, 749 F.3d at 1063. The EPA overstepped its authority when it attempted to control the outcome of such suits—not by exercising its recognized authority to set emission standards, but by purporting to create an affirmative defense to be used in court. Here, by contrast, the TCPA's private right of action is predicated on "regulations prescribed under" the TCPA, and the Commission exercised its well-established authority to waive violations of those regulations for good cause under 47 C.F.R. § 1.3.

[56] *Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 F.C.C. Rcd. 13998, 14008 (2014).

[57] *See Simon v. Healthways, Inc.*, No. CV1408022BROJCX, 2015 WL 10015953, at *7 (C.D. Cal. Dec. 17, 2015) (addressing *Stryker* and rejecting its holding).

FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action" appears based on the false premise that the Commission's waiver related to a statutory term.[58] Third, federal courts have since rejected *Stryker* and its holding.[59] Finally, the Commission itself, following *Stryker's* ruling, reiterated that retroactively waiving its own rules when federal litigation is pending does not violate the separation of powers doctrine: "At the outset, we dismiss arguments that by granting waivers while litigation is pending violates the separation of powers as several commenter have suggested. As the Commission has previously noted, by addressing requests for declaratory ruling and/or waiver, we are interpreting a statute, the TCPA, over which Congress provided the Commission authority as the expert agency."[60] Petitioners' argument on this point is accordingly misguided on multiple levels and should be rejected.[61]

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[58] *Stryker*, 65 F. Supp. 3d at 498.

[59] *See Simon*, 2015 WL 10015953, at *7 (rejecting *Stryker* and holding "FCC has the authority to grant such a retroactive waiver"); *Bais Yaakov of Spring Valley v. Graduation Source, LLC*, No. 14-CV-3232 (NSR), 2016 WL 1271693, at *5 (S.D.N.Y. Mar. 29, 2016) ("The Waiver does not, as Plaintiff contends, retroactively release Defendants from statutory liability. As stated previously, on its face the TCPA only prohibits the sending of unsolicited faxes. It is the FCC's regulation interpreting the TCPA that extends the protections of the statute to solicited faxes. Thus, it is within the FCC's authority to determine when and how to apply this regulation, and to waive it for good cause.").

[60] *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 8598 (2015).

[61] Petitioners' claim that the waiver interferes with the district court's jurisdiction is also misplaced. *See* Petition at 21. The district court's order that Petitioners reference is the summary judgment motion discussed above in which Papa Murphy's argued that the Commission's July 2015 Order should not be applied retroactively. Admittedly, the court found against Papa Murphy's on that question; however, that ruling has no bearing on how the Commission should have ruled on a different legal question under a different legal standard. Petitioners' suggestion that the Commission's order "attempts to undermine the District Court's jurisdiction" is accordingly misguided—the Commission is a federal agency charged with determining when it is appropriate to waive its rules; how a federal court rules on a separate legal question does not diminish that authority.

C. The Commission's order is not an adjudicatory rule to which the *Retail, Wholesale* analysis applies.

Petitioners contend that the Commission's order created "de facto rule" to which the "five-factor test for determining whether an adjudicatory rule may have retroactive effect" set out in *Retail, Wholesale & Dep't Store Union, AFL-CIO v. N. L. R. B.*, 466 F.2d 380 (D.C. Cir. 1972) applies.[62] Petitioners are mistaken. The *Retail, Wholesale* test centers on when it is fair to apply a new rule of decision that emerges through adjudication to past conduct.[63] It is inapplicable to the waiver here, which does not set out new substantive law, but rather declines to apply an existing rule to particular circumstances.[64]

Even if the *Retail, Wholesale* framework were germane, it would support retroactive application of Commission's order. "Retroactivity is the norm in agency adjudications no less than in judicial adjudications,"[65] and "retrospective application can properly be withheld" only where it "would work a 'manifest injustice.'"[66] Petitioners cannot meet this high burden. Indeed, they ignore the unfairness that would result *absent a waiver*: Well-meaning companies, such as Papa Murphy's, would be subject to significant liability for violations of an obligation that the Commission itself has found was unclear.[67]

Petitioners point to the expenses they have incurred in pursuing a claim based on asserted violations of the Commission's prior express written consent rule,[68] but Mr. Lennartson pursued

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[62] Petition at 21–22.

[63] *See, e.g.*, *Retail, Wholesale*, 466 F.2d at 387–88 (D.C. Cir. 1972) (retroactive application of ruling on unfair labor practice); *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc) (retroactive application of ruling on competing preferences in licensing decision).

[64] This is consistent with the position that Papa Murphy's took the putative class action in which Papa Murphy's argued that the Commission's July 2015 Order, which definitively set the standard for pre-October 2013 opt-ins, should not be given retroactive effect. Nowhere did Papa Murphy's assert that a waiver of the Commission's rules, as opposed to a new substantive rule, falls within the *Retail, Wholesale* analysis.

[65] *AT&T Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006).

[66] *Clark-Cowlitz*, 826 F.2d at 1081 (quoting *Thorpe v. Hous. Auth. of the City of Durham*, 393 U.S. 268, 282 (1969)).

[67] *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 8014 (2015).

[68] Petition at 23–24.

these claims and incurred those costs when the clarity of written consent obligation had been clouded by the Commission's 2012 order. Accordingly, any hardship analysis weighs significantly in favor of a waiver, rather than against it.[69]

D. The general savings statute is inapplicable here and does help Petitioners' argument.

Petitioners argue that the General Savings Statute, 1 U.S.C. § 109, bars the Commission from extinguishing liability under the TCPA by waiving one of its rules retroactively.[70] But that law is irrelevant here. This matter does not involve the "repeal" of a "statute."[71] It involves the waiver of a rule. The General Savings Statute is inapplicable and Petitioners' argument on this point should be rejected.

V. CONCLUSION

For all of the foregoing reasons, Papa Murphy's respectfully requests that the Commission deny Petitioners request to reconsider its October 14, 2016 order.

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[69] The remaining factors in the *Retail, Wholesale* analysis similarly support retroactive application of the waiver. Regarding the first two factors, this is not a situation in which the Commission departed from well-established practice. Pursuant to the Commission's rules, it granted waivers of the same provisions to the petitioners in its June 2015 Order. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 8014 (2015). The Commission also recently granted similar retroactive waivers regarding its rules governing fax advertisements. *See Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 F.C.C. Rcd. 13998, 13998 (2014). The fifth factor, regarding statutory interest, also weighs in favor of a retroactive waiver. As detailed above, the Petitioners' privacy interests are in no way severed by rejecting a waiver. Petitioners sought to receive text messages and have long since been opted out of the program. The TCPA is not served by creating liability for well-meaning companies based on, what the Commission has characterized, as an unclear standard.

[70] *See* Petition at 24–25.

[71] 1 U.S.C. § 109.

Respectfully submitted this 25th day of November, 2016.

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